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hmcpeake@goodwinprocter.com
glenn.williams@goodwinprocter.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LI SHU and JOHN J. TURKOVICH

Appeal 2009-004145
Application 10/790,584¹
Technology Center 2600

Decided: July 1, 2010

Before ROBERT E. NAPPI, JOHN C. MARTIN, and
JOSEPH F. RUGGIERO, *Administrative Patent Judges*.

MARTIN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING²

¹ The real party in interest is The Charles Stark Draper Laboratory, Inc. Req. Reh'g 1.

² The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants have filed a Request for Rehearing (“Request”) of our December 18, 2009, Decision on Appeal (“Decision”) to the extent we affirmed the Examiner’s rejection of dependent claim 9 under 35 U.S.C. § 103(a) for obviousness over Ahmed in view of Kennedy. Decision 5-7. We reversed the rejection of claims 1, 2, and 7, on which claim 9 depends, and other claims under 35 U.S.C. § 102(e) for anticipation by Ahmed because we agreed with Appellants that Ahmad’s routing scheme does not include predicting a future location of a destination node. Specifically, we agreed (Decision 5) with Appellants that Ahmed’s disclosure of “periodically updating current location information is not the same as making routing decisions based on predicted locations” and that “[w]hereas Ahmed’s system bases routing decisions on where a node was or may still be, it cannot base decisions on where a node will be.” (Reply Br. 2.)

We affirmed the rejection of claim 9³ because Appellants argued that claim 9 is patentable for the same reasons as claim 1 without addressing the Examiner’s alternative reliance on Kennedy as teaching a routing scheme that includes predicting a future location of a destination node, as required by claim 1.⁴ Specifically, we understood the Examiner’s finding that

³ Claim 9 reads as follows:

9. The method of claim 7, further comprising causing one of the selected plurality of intermediate nodes to alter a routing list of future intermediate nodes of the selected plurality of intermediate nodes when the predicted location of the destination node was based on outdated information.

⁴ Regarding claim 9, Appellants argued only:
(Continued on next page.)

“Kennedy teaches the feature of alter[ing] a routing list of future intermediate nodes of the selected plurality of intermediate nodes when the *predicted* location of the destination node was based on outdated information (see the abstract, par[as.] [6], [11], [12], [28], [30], [31])” (Final Action 9 (italics added) (first and second brackets added)) to mean: (1) Kennedy teaches selecting an intermediate node based on the *predicted* future location of a destination node (as required by claim 1); *and* (2) Kennedy teaches updating a list of intermediate nodes under the circumstances recited in claim 9. Decision 6. We further found (Decision 6-7) that “[t]he Examiner’s reliance on Kennedy for the above two teachings is stated even more clearly . . . in the Answer,” citing page 8 thereof, wherein the Examiner states that

Kennedy discloses the future routes are predicted based on the historic and current data (see [28]-[30]), thus Kennedy discloses the routing of messages based on future location prediction. Kennedy also discloses route failure and performing alternative routes prediction to replace route[s] predicted to fail (see [33]-[34]), thus Kennedy discloses “altering a routing list of future intermediate nodes of the selected plurality of intermediate nodes

Claim 9 depends from claim 1, and is therefore patentable for the reasons discussed above. The Examiner relies on Kennedy merely to show that a routing table associated with a network node can be updated if the information is deemed outdated, not to teach the routing of messages based on predicted future locations, as claimed.

(Br. 6.) Claim 9 is not discussed in the Reply Brief.

when the predicted location of the destination node was based on outdated information”.

(Answer 8 (second brackets added).⁵) The above-quoted passage also appears at page 12 of the Answer.

In the Request, Appellants argue that the Examiner’s above-quoted finding from page 9 of the Final Action is incorrect to the extent it refers to “the predicted location of the destination node” because

Kennedy does not teach predicting a future location of a destination node as claimed. At best, per the Examiner’s statement, Kennedy merely teaches altering a routing list stored at intermediate nodes — that is, the route that information follows through the network from a source node to a destination node. The actual physical location of the destination node is of no concern to Kennedy. Rather, Kennedy is concerned with the anticipated stability of network routes. The predicted routes comprise “route segments” identified before any particular route is needed. If a route is based on outdated information, the routing list is altered. Predicting the stability of a route has nothing to do with predicting the future location of a particular node, and particularly not the destination node, and the Examiner did not contend that it does. Yet that is precisely what claim 9, which depends on claim 1, requires.

(Req. Reh’g 2 (emphases omitted) (footnotes omitted).) This argument is entitled to no consideration because it was not initially presented in the Brief or Reply Brief. *See* 37 C.F.R. § 41.52(a)(1) (2009) (“Arguments not raised

⁵ Appellants are therefore incorrect to characterize our understanding of the above-quoted finding from page 9 of the Final Action as based on the above-quoted passage in the Answer. (Req. Reh’g 2.)

in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing except as permitted by paragraphs (a)(2) and (a)(3) of this section.”). For the same reason, Appellants are also incorrect to wait until the Request to address the meaning of Examiner’s above-noted statements in the Answer or to specifically argue the merits of claim 9.

Furthermore, Appellants’ above argument is unpersuasive on the merits. The assertion that “[t]he actual physical location of the destination node is of no concern to Kennedy” is not understood. Kennedy’s routing method begins by “predicting future-needed routes in the network 10” based “upon current and historical traffic data, for example” (Kennedy [0030]), which we understand to mean predicting which pairs of nodes will be used to communicate with each other at some future point in time. Next, the future-network dynamics and/or topology are predicted and routes, including partial routes or complete routes, are discovered along predicted future-needed routes in the network (*id.*). The term “topology” presumably refers to the relative locations of the various nodes, including any nodes that will be expected to function in the future as destination nodes. Note Kennedy’s explanation that the list of information that should be placed into a database to facilitate more accurate and useful predictions should include, *inter alia*, the “[e]xpected locations of nodes at planned times” and the “[p]robability associated with each of the expected locations of nodes at the planned times.” *Id.* at [0140], [0149], [0150]. In this vein Kennedy more specifically explains that

[d]ata, such as mission and historical node movement data, are used to to [sic] forecast the need for communications between two nodes at some point in the future. ΨRp will attempt to satisfy this need by predicting from a variety of information what the network will topologically look like at the time the route is actually needed, determining the likelihood that a complete route can be predicted for the appointed future time, and identifying parts of the full route (route segments) that could be reliably predicted in the event it is deemed too hard to predict the full route.

Id. at [0105].

Appellants have not adequately explained why Kennedy's predictive routing method, which includes predicting the future network topology, cannot accurately be characterized as involving prediction of a future physical position of a destination node.

DECISION

Appellants' Request that the Decision be modified by changing the affirmation of the rejection of claim 9 under 35 U.S.C. § 103(a) to a reversal of that rejection is denied.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1). *See* 37 C.F.R. § 1.136(a)(1)(v) (2009).

DENIED

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babc

GOODWIN PROCTER LLP
PATENT ADMINISTRATOR
53 STATE STREET
EXCHANGE PLACE
BOSTON, MA 02109-2881